



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Seating Company

File: B-229915

Date: April 26, 1988

DIGEST

1. Objections to matters occurring during the course of agency site visit are untimely raised, and will not be considered on the merits, when protested more than 10 working days after the site visit.
2. Solicitation for work stations permitted a firm to offer a configuration that included certain unfinished components. Agency properly evaluated price of protester's work station configuration based on all finished components, however, because that is how the protester configured the work stations in its offer.
3. Agency reasonably concluded that awardee offered a commercial product (i.e., a product purchased by entities other than the federal government) where evidence indicated that the awardee marketed the offered product to state and local governments.
4. Protest of awardee's alleged failure to conform exactly with minimum "quality" standards is denied, because inherent in the designation of a feature as a "quality" standard is the expectation that the feature will be appraised subjectively in terms of degree of desirability, excellence, or suitability, and the agency's appraisal appears reasonable.

DECISION

American Seating Company (AmSeCo) protests the Department of Justice's award of a fixed-price, requirements-type contract to Krueger, Inc., under request for proposals (RFP) No. LPI-0072-7 issued by UNICOR, Federal Prison Industries, Inc., for commercial, off-the-shelf office systems furniture (employee work stations (cubicles) incorporating moveable partition panels, hang-on work surfaces, shelving, etc.) and

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computer-aided design/(space planning) services.^{1/} The RFP set out specific minimum quality standards for the systems furniture, and included design drawings of five typical work stations showing each work station's component parts. Offerors were directed to configure their commercial lines of systems furniture into each of the five work stations depicted in the drawings. The RFP advised offerors that the five configurations provided the basis for "evaluating adaptability of the offeror's commercial product" to fulfill the requirements of the solicitation, and for a cost comparison of the offered systems.

The protester contends that its proposal was improperly downgraded and that the awardee's products do not conform to the RFP's requirements. We dismiss the protest in part and deny it in part.

The protester first contends that the agency's computer-aided design (CAD) evaluator improperly required a demonstration of the protester's CAD capabilities at the airport near the protester's facility, instead of at the facility itself. The protester argues that because the demonstration was conducted in an unsatisfactory environment, using only a portable computer, its proposal was not evaluated fairly in the area of design services. This objection to the site and circumstances of the CAD demonstration is untimely raised, however, since the protester knew the basis of the protest on October 7, 1987, when it participated in the airport demonstration. Our Bid Protest Regulations require that a protest alleging other than solicitation improprieties be filed no later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). Since AmSeCo knew the basis of its protest on October 7, the protest should have been received in our Office by October 21. The protest was not filed until December 29.

The protester's second contention is that it was prejudiced during an October 21 factory visit when agency evaluators judged its furniture system for system flexibility (ease of

^{1/} UNICOR (the trade name of Federal Prison Industries, Inc., a wholly-owned government corporation) is a value added reseller in the government office systems market using inmate labor to work the primary furniture and components obtained under contract with regular manufacturers into finished office systems, which UNICOR then offers for sale to agencies of the federal government.

moving and reinstallation) and reconfiguration only by observing the production of the system and without actually handling the completed components. For the same reason stated in connection with the CAD demonstration issue, this matter, first raised in the December 29 protest, is untimely.

The protester's third contention is that the agency erroneously evaluated AmSeCo's proposal by applying a 55 percent instead of a 68 percent discount to unpainted/unfinished parts (also referred to as grey parts).

The protester's proposal contained two pricing sections: (1) finished product--pricing for each of the five work stations as required by the RFP; and (2) "raw (grey) parts"--unsolicited pricing for orders of unpainted parts of at least \$5,000. Both pricing sections provided volume discounts off list price for the items listed. Finished product discounts ranged from 55 percent to 70 percent, based on volume ordered, while grey parts carried a flat 68 percent discount.

The agency only evaluated the protester's finished product pricing since the RFP only required pricing in conjunction with the five-work-station configuration requirement, and the protester did not include any grey product items in its prices for the five work stations. The agency applied the protester's minimum order discount of 55 percent to the total list price for the items comprising the protester's five configured work stations because the agency did not know whether it would order sufficient quantities to justify the higher discounts offered.

The protester argues that because the RFP's guidelines for pricing the five work stations stated that certain items (some panel accessories, supporting hardware for work surfaces, overhead storage units, shelving and pedestal units) were to be furnished in an unpainted or grey form, it was unreasonable for the agency not to consider the 68 percent discount offered for grey products. In any event, the protester urges that the agency should have asked the protester "to re-evaluate its pricing as to finished goods only since the pricing on finished goods was to be the only basis for evaluation." In other words, the agency evaluators either should have reconfigured the protester's five work stations substituting appropriate grey parts for the finished product, or at least warned the protester of the adverse consequences of not including grey product in the configuration of the five work stations.

We find no merit in the protester's argument. Although under the RFP's price submission guideline it appears that offers incorporating grey parts for the referenced items were expected, nothing in the solicitation precluded a firm from offering a work station configured with finished parts. In fact, the RFP specified that the guidelines might not reflect the exact state of completion of the items that actually would be bought, but were intended "to assure consistency in pricing by all offerors." Moreover, our review of AmSeCo's offer discloses no ready way the agency, on its own, could have substituted grey product pricing for finished product pricing, with any assurance the substitutions were compatible and in fact consistent with AmSeCo's intended offer. In sum, each offeror was responsible for determining which of its commercial items it would offer for each work station configuration. Since the protester's five-work-station configurations only contained finished products and its grey product pricing was neither associated with the five work stations nor otherwise offered, we see no reason why the agency should have been expected to substitute grey for finished products during the pricing evaluation.

Further, we do not think that the agency was obligated to discuss with the protester the effect of the firm's decision to offer and price only finished product for the five work stations. It was obvious that a submission quoting all finished products would have a higher price than one quoting a mix of finished and less expensive grey products, and it was clear that the agency would only evaluate pricing associated with the offerors' five-work-station configurations; nevertheless, even though AmSeCo apparently could provide grey products it elected to quote only finished products for the configurations. Given these circumstances, we think that the protester had adequate notice of the agency's intentions and of the consequences of its decision to quote finished products, and that the agency had no duty to discuss this matter with the protester.

The protester's remaining contentions concern the awardee's proposal. AmSeCo first urges that the awardee's offer is unacceptable because some of the awardee's products do not meet the RFP requirement that "products offered must be regularly manufactured, commercially available, off-the-shelf items." The protester notes the RFP requirement that:

"Offeror shall provide . . . a product catalogue and current installation instructions for each system submitted, as part of the solicitation package."

AmSeCo argues that the awardee's lockable file bin was specially fabricated for UNICOR and that the awardee's apparent lack of publicly distributed general product catalogs and brochures, or any identified ordinary commercial sales of comparable products, leads to the conclusion that the awardee's products are not commercially available.

The awardee responds, and the agency confirms, that the awardee offered its System XXI. The awardee developed the System XXI during the summer of 1986 for marketing to federal and state correctional industries as a spin-off product from its Com System line. At that time the awardee's sales representative for correctional industries was Correctional Products & Services, Inc. (CPSI). The awardee states that it understands that CPSI had marketed System XXI to seven state correctional industries programs before the parties terminated their relationship. The awardee further states that it has continued marketing to state and local correctional industries using a System XXI product brochure and quoting prices on a job-by-job basis. The awardee advises that it continually modifies its entire product line to meet customer requirements and that once it decides to adopt and manufacture a customer-inspired design variation the variation is incorporated into the product line as either a standard item or an option. The awardee claims that the lockable file bin is part of System XXI which has been sold to private sector customers and marketed since September 1987.

We find no merit to the protest on this issue. Initially, we note that the protester's position presumes that commercial availability had to be established by reference to product catalogs. However, the RFP required no such means of proof. We have held, furthermore, that published announcements are not necessary to show that equipment is commercially available. Control Data Corp. and KET, Inc., 60 Comp. Gen. 548 (1981), 81-1 CPD ¶ 531. Thus, the apparent lack of commercial catalogs would not preclude the agency from concluding that the awardee's System XXI was commercially available. Digital Equipment Corp., B-219435, Oct. 24, 1985, 85-2 CPD ¶ 456. The commercial availability of a product is a broad concept that may be satisfied in different ways, and we will not disturb a contracting officer's discretionary determination that a commercial product requirement has been met as long as there is evidence to support that determination. Id.

The interpretation of a solicitation's commercial product requirement should be consistent with the meaning of the term "commercial product" as used in Federal Acquisition Regulation, which, we have noted, essentially provides that

an item is not a commercial product when its only use is for the government instead of the general public, or when it has been offered for sale commercially but no sales other than to the government have actually occurred. See Senstar Corp., B-225744, Apr. 2, 1987, 87-1 CPD ¶ 373; Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153. Because it is clear that System XXI existed before the RFP was issued and has been marketed and evidently sold to state and local governments, as distinguished from the federal government, we find the agency reasonably concluded that the awardee offered a commercial product.

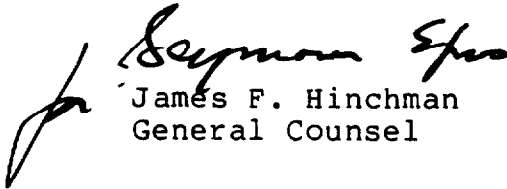
AmSeCo next alleges that the agency improperly waived RFP minimum quality standards for the awardee's products in the areas of (i) interlocking finished end trim, (ii) panel frame slot spacing, (iii) panel connection sound and light barrier, and (iv) cantilevered work surfaces. This allegation appears to be based on the protester's detailed knowledge of earlier versions of System XXI. The agency and the awardee respond that the questioned products satisfy the minimum quality standards. For example, the agency reports that the design of System XXI conceals the interlocking mechanism from view so there is not need for end trim, and that inspections of the System XXI slot spacing, panel connection and cantilevered work surfaces show that they conform to the minimum quality standards.

We see no merit in the protester's allegations. Even if we assumed that some of the awardee's items did not conform exactly to the minimum quality standards--the interlocking finished trim, for example--we think that the nonconformance would not automatically render the awardee's offer technically unacceptable. Inherent in the designation of a feature as a "quality standard" is the expectation that the feature will be appraised subjectively, in terms of degree of desirability, excellence or suitability. In this regard, we expressly have recognized the difficulty of creating a mandatory federal specification for the procurement of systems furniture due to the complexity of the furniture, multiplicity of product lines, and diversity of performance characteristics. Art Metal - U.S.A., Inc., B-190127, July 10, 1978, 78-2 CPD ¶ 27 at 13-14. Here we see no legal basis to object to UNICOR's judgment that the "quality" of the system the awardee offered was acceptable.

The protester also urges that the documentation the awardee furnished with its offer does not establish that the equipment meets certain RFP test standards. Our Office, however, has been provided copies of the questioned test results and our review of the documentation discloses no basis for questioning the agency's conclusion that the test results were acceptable.

Finally, the protester questions the awardee's ability to meet the RFP's delivery schedule (f.o.b. destination, within 60 days of order). This argument concerns the agency's affirmative determination of the awardee's responsibility, a determination our Office will not review where, as here, there has been no showing of possible fraud on the part of the contracting officials or an allegation of misapplication of definitive responsibility criteria. 4 C.F.R. § 21.3(f)(5); Ambel Precision Mfg., B-227996, Nov. 23, 1987, 87-2 CPD ¶ 502.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel